Nos. 84-744 and 84-963

In the Supreme Court of the United States

OCTOBER TERM, 1984

UNITED STATES OF AMERICA, PETITIONER

v.

JAMES C. LANE AND DENNIS R. LANE

JAMES C. LANE AND DENNIS R. LANE, PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether the court of appeals erred in reversing defendants' convictions on the basis of misjoinder under Rule 8 of the Federal Rules of Criminal Procedure without determining whether the misjoinder constituted harmless error.

2. Whether there was sufficient evidence to support defendants' convictions for mail fraud under 18 U.S.C. 1341.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-20a)[1] is reported at 735 F.2d 799.

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[1] The appendices to each petition are identical.

JURISDICTION

The judgment of the court of appeals (Pet. App. 21a) was entered on June 18, 1984. A petition for rehearing was denied on August 22, 1984 (Pet. App. 22a-23a). On October 11, 1984, Justice White extended the time in which to file the government's petition for a writ of certiorari to November 20, 1984, and the petition was filed on November 6, 1984. The defendants' cross-petition for a writ of certiorari was filed on December 7, 1984. The petitions were granted on February 19, 1985 (J.A. 25, 26). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE AND RULES INVOLVED

18 U.S.C. 1341 provides:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or

thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

Fed. R. Crim. P. 8 provides:

> (a) Joinder of Offenses. Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.
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> (b) Joinder of Defendants. Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series or acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.

Fed. R. Crim. P. 52(a) provides:

> Harmless Error. Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

STATEMENT

After a jury trial in the United States District Court for the Northern District of Texas, James C. (J.C.) Lane was convicted on four counts of mail fraud, in violation of 18 U.S.C. 1341, and one count of conspiracy, in violation of 18 U.S.C. 371. He was sentenced to concurrent terms of five years' imprisonment on the first mail fraud count and on the conspiracy count, to be followed by concurrent terms of

two years' imprisonment on the other three mail fraud counts, and fined a total of $9,000. His son, Dennis R. Lane, was convicted on three counts of mail fraud, one count of conspiracy, and one count of perjury, in violation of 18 U.S.C. 1623. Pursuant to the Young Adult Offender Act, he was sentenced to concurrent terms of custody under the Youth Corrections Act (18 U.S.C. 4216, 5010(b)).[2] See Pet. App. 8a n.5. The court of appeals reversed (*id.* at 1a-20a).

A. The Factual Background

Defendants were each charged in five counts of a six-count indictment encompassing three arson-for-profit schemes (J.A. 13-20). Count 1 charged J.C. Lane with mail fraud in connection with a 1979 fire in the El Toro restaurant in Amarillo, Texas. Counts 2 through 4 charged both defendants with mail fraud in connection with a 1980 fire in a duplex in Amarillo. Count 5 charged both defendants with conspiracy in connection with the planned arson of a flower shop in 1980 in Lubbock, Texas. Count 6 charged Dennis Lane with perjury before a grand jury investigating the flower shop scheme in 1981. Defendants' motions for severance before and during trial were denied. They were tried jointly and convicted on all counts. Pet. App. 8a.

1. *The El Toro Restaurant Fire*

The evidence at trial showed that J.C. Lane and three partners opened the El Toro restaurant in Amarillo in the summer of 1978. They leased the

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[2] The Young Adult Offender Act and the Youth Correction Act were repealed by Section 218(a)(5) and (8) of the Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 2027.

building and restaurant equipment for a term of five years. Pet. App. 2a; Tr. 35-37. A clause in the lease provided that it would be terminated under certain circumstances in the event of a fire (Tr. 37; GX 1). The restaurant never operated at a profit, suffering declining sales after September 1978 and sustaining losses of $20,000 during 1978 and $9,000 during the two months that it operated in 1979 (Pet. App. 2a, 3a n.1; Tr. 142-151).

J.C. Lane purchased fire insurance for the restaurant in November 1978, covering the contents and improvements for $10,000 each and providing a maximum of $18,000 for business losses. At about the same time he contacted Sidney Heard, a professional "torch," asking him how much it would cost to burn the building and stating that he wanted to get out of his lease and the partnership.[3] Heard set a fire in the building on February 27, 1979, which did not destroy it but did damage its contents. Pet. App. 2a; Tr. 237-242.

The insurance company settled with Lane for $10,000 on the building's contents and $9,200 on the improvements. Drafts in these amounts were issued by the company on April 23, 1979, and May 3, 1979, respectively. Pet. App. 2a; Tr. 106-108; GX 9-12. On June 1, 1979, the insurance adjustor mailed a memorandum to the company's regional headquarters concerning settlement of Lane's business-interruption claim. Included with the memorandum was a list of the restaurant's monthly income and expenses sub-

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[3] Evidence of Heard's prior dealings with J.C. Lane in connection with two other arsons was excluded by the trial court (Tr. 229, 370-376). Heard, who testified at trial, had entered into a plea agreement with the government (Tr. 265-275, 605-606).

mitted and signed by J.C. Lane, falsely claiming a net monthly profit of $2,500. Pet. App. 2a-3a; Tr. 74-76; GX 13. This mailing was charged in count 1 of the indictment (J.A. 14). On November 1, 1979, the business-interruption claim was settled for $2,700, and the insurance company issued to Lane a draft for that amount on that date. Pet. App. 3a; Tr. 77-78; GX 15.

Dennis Lane was not involved in the restaurant arson. At the time the evidence relating to this count was received, the trial judge instructed the jury that the evidence was not to be considered against him (J.A. 21). The judge repeated this instruction in her final charge, together with an instruction regarding the separate consideration to be given each defendant and each count (*ibid.*).

2. ***The Duplex Fire***

In early 1980, J.C. Lane hired Heard to set fire to a duplex that Lane was moving to a vacant lot in Amarillo (Pet. App. 3a; Tr. 243-245). The duplex was owned by Dennis Lane and Andrew Lawson, doing business as L & L Properties. On January 22, 1980, J.C. Lane obtained a $35,000 fire insurance policy on the building, which had been purchased for $500. Pet. App. 3a; Tr. 50-52, 57. The duplex was burned on May 1, 1980, by Marvin McFarland, an employee of Heard's (Pet. App. 4a; Tr. 246-250, 319-320). A week or two later, J.C. Lane told Heard that, as the building was not a total loss, he planned to " 'stick it to' " the insurance company by submitting repair invoices for reimbursement (Tr. 250).

On May 9, 1980, the insurance adjustor issued an initial draft of $7,000 on the policy to Dennis Lane and his partner Lawson as an advance for repairs to

the duplex. At the same time, Lane and Lawson signed a proof-of-loss form claiming a partial loss of $7,000 and stating that the " 'loss did not originate by any act, design or procurement on the part of your insured or this affiant' " and that " 'no attempt to deceive [the] company as to the extent of the loss has been made.' " On May 15, 1980, the adjustor mailed to the insurance company's headquarters a report on expected repair costs that had been submitted by Dennis Lane along with his partial proof-of-loss form. Pet. App. 4a; Tr. 165-168; GX 34A-34E, 35. This mailing was charged in count 2 of the indictment (J.A. 15-16).

On May 21 and 30, 1980, the adjustor issued additional drafts to the insured for $2,000 and $3,000, respectively. Dennis Lane submitted to the adjustor proof-of-loss forms corresponding to each payment. On May 25, 1980, the adjustor mailed Lane's $2,000 proof-of-loss form to company headquarters, together with a memorandum indicating that repairs were in progress and had exceeded the initial $7,000 advanced earlier. On August 6, 1980, the adjustor mailed another progress report to headquarters, along with Lane's $3,000 proof-of-loss form and an additional $2,000 proof-of-loss form.[4] Pet. App. 4a-5a; Tr. 171-175; GX 37-38, 39A-39C. The August 6 mailing was charged in count 3 of the indictment (J.A. 16).

On September 16, 1980, the adjustor issued to Dennis Lane a draft for $12,250, representing final

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[4] It is not clear from the record whether this claim is the same as that represented by the $2,000 proof-of-loss form mailed on May 25, 1980. The court of appeals assumed, and we do not dispute, that the proof-of-loss forms mailed on August 6, 1980 related to the drafts issued earlier. See Pet. App. 5a n.3, 15a-16a n.10.

settlement of his claims relating to the duplex and bringing the total amount paid to over $24,000 (Pet. App. 5a; Tr. 175-176; GX 40). Two days later, the adjustor mailed a memorandum to company headquarters explaining the high total cost of restoration (the original estimate had been for $14,000) on the basis of roof damage that had required additional repairs. The adjustor included in his report a number of invoices supplied by Dennis Lane that listed various materials and furniture purportedly purchased by L & L Properties to repair and refurbish the duplex. Pet. App. 5a; Tr. 176-183; GX 41A-41N. In fact, the invoices had been fabricated by J.C. Lane together with Heard and his secretary (Pet. App. 5a; Tr. 250, 256-262; GX 45-56). The September 18 mailing was the subject of count 4 of the indictment (J.A. 16-17).

3. The Flower Shop Conspiracy

At a meeting with defendants and Lawson several weeks after the duplex fire, Heard proposed that they establish and burn a phony flower shop in Lubbock. The Lanes agreed to participate in the plan. Heard's associate, William Lankford, who operated L & L Designs, an artificial-flower business in Amarillo, agreed to stock the Lubbock shop with old flowers and broomweed. Heard and Dennis Lane picked out a suitable building in July 1980, which Lankford stocked in August. Pet. App. 5a-6a; Tr. 251-255, 275-277, 286-287. Lankford prepared fictitious invoices for merchandise purportedly delivered to the shop. In November 1980, J.C. Lane insured the contents of the shop for $50,000. Heard was later arrested and Lankford questioned with respect to an unrelated crime, and the planned arson of the flower shop never took place. Pet. App. 7a; Tr. 400-402, 458-459, 475-476, 479. The flower

shop conspiracy was charged in count 5 of the indictment (J.A. 17-19).

4. *Dennis Lane's Perjury*

In March 1981, a newspaper article connected Dennis Lane to a scheme to burn the Lubbock flower shop with Heard. The same day that the article appeared, J.C. Lane cancelled the insurance policy on the shop. Pet. App. 7a; Tr. 406, 416-417. On May 12, 1981, Dennis Lane appeared before a grand jury investigating Heard. He testified that Heard had nothing to do with the flower shop or with his own dealings with Lankford. Pet. App. 7a-8a; Tr. 548-549; GX 92A, at 68. On the basis of this testimony, Dennis Lane was charged with perjury in count 6 of the indictment (J.A. 19-20).

B. The Court Of Appeals' Decision

1. The court of appeals reversed defendants' convictions, holding (Pet. App. 9a) that count 1 "should not have been joined with the others [under Fed. R. Crim. P. 8(b)] because it was not part of the same series of acts or transactions as Counts 2 through 6." The court reasoned that the El Toro restaurant fire was entirely separate from the other crimes and that it was not linked to them by any common scheme or plan (Pet. App. 9a-13a). The court did conclude, however, that counts 2 through 6 were properly joined (*id.* at 13a).

The court refused to consider the government's argument that the error, if any, was harmless. Stating only that "Rule 8(b) misjoinder is prejudicial *per se* in this circuit" (Pet. App. 13a) and that misjoinder is "inherently prejudicial" (*id.* at 10a), the court remanded for new trials on all counts. Under

the court's ruling (*id.* at 13a), defendants on remand may be tried jointly on counts 2 through 6, with a separate trial for J.C. Lane on count 1.[5]

2. The court of appeals rejected the Lanes' contention that the evidence was insufficient to support their mail fraud convictions on counts 2 through 4, which involved the 1980 duplex fire in Amarillo (Pet. App. 15a-18a).[6] Defendants argued that the charged mailings could not have been in furtherance of their fraudulent scheme because each took place after the insurance company had issued to them the draft related to the mailed proof-of-loss forms or invoices (*id.* at 16a). In rejecting this argument, the court of appeals relied on this Court's decision in *United States* v. *Sampson*, 371 U.S. 75 (1962), reasoning that mailings occurring after payment may be "in execution of fraud" where they are "designed to lull the victims into a false sense of security and postpone investigation" (Pet. App. 17a). The court of appeals concluded that the evidence supported a jury

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[5] Alternatively, although the court of appeals did not address the issue, it seems clear under Fed. R. Crim. P. 8(a) that count 1 could properly be joined with counts 2 through 5 at a trial of J.C. Lane alone. Accordingly, each defendant may be tried on all his charges at a trial separate from that of the other defendant's.

[6] The court of appeals also rejected J.C. Lane's challenge to the sufficiency of the evidence supporting his conviction on count 1 (the restaurant fire) (Pet. App. 13a-15a) and Dennis Lane's challenge to the sufficiency of the evidence supporting his conviction for perjury (*id.* at 18a-20a), challenges that they do not renew in this Court (see 84-963 Cross-Pet. 3). Defendants did not argue in the court of appeals, and do not now argue, that the evidence was insufficient to support their convictions for conspiracy in connection with the planned flower shop arson (see Pet. App. 20a n.13).

inference that the charged mailings "were intended to and did have a lulling effect" because they helped to convince the insurance company that "the claims were legitimate" (*id.* at 17a-18a (footnote omitted)).[7] The court reasoned (*id.* at 18a):

> The Proofs of Loss declared that the "loss did not originate by any act, design or procurement on the part of [the] insured" and that no attempt had been made to deceive the insurance company. [The company] required the insured to submit the forms; any failure to comply might have alerted [it] to the possibility of fraud.
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> Similarly, the invoices gave the impression of a perfectly innocent claim. The building supplies and furniture that Lane claimed to have purchased for the duplex were set out in minute

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[7] The court of appeals noted (Pet. App. 17a n.11) that the district court's instructions accorded with this view of the law. Defendants did not challenge the jury instructions in the court of appeals and do not appear to do so in this Court. The district court instructed the jury that each charged mailing must be "for the purpose of executing the scheme to defraud" (J.A. 22) and that "the use of the United States mails [must be] closely related to the scheme in that the accused either mailed something or caused it to be mailed in an attempt to execute or carry out the scheme" (J.A. 23). The district court further instructed the jury that a use of the mails "can not be for the purpose of executing such scheme as alleged in the indictment * * * *if the alleged scheme in its entirety was completed prior to the mailing alleged in the indictment.*" *Ibid.* (emphasis added). The district court also stated to the jury that mailings "which relate to the acceptance of the proceeds of the scheme or which facilitate concealment of the scheme are mailings in furtherance of the scheme" (J.A. 24).

detail. The invoices were dated randomly and torn out of the invoice book at random points to indicate that L & L Properties was not the sole customer of the [alleged supplier]. A reasonable jury could find that all of these details were intended to lull [the insurance company] into a false sense of security.

SUMMARY OF ARGUMENT

I

Rule 52(a) of the Federal Rules of Criminal Procedure requires a reviewing court to disregard "[*a*]*ny* error * * * which does not affect substantial rights" (emphasis added). This Court has similarly made it clear that "it is the duty of a reviewing court to consider the trial record as a whole and to ignore errors that are harmless." *United States* v. *Hasting*, 461 U.S. 499, 509 (1983). There is no rational basis for holding that this duty does not extend to violations of Fed. R. Crim. P. 8—indeed, misjoinder is a garden variety technical error that, while sometimes prejudicial to the defense, is not inherently associated with prejudice. Those courts of appeals that review joinder errors for potential prejudice have had no difficulty in assessing on a case by case basis the harmfulness of misjoinders under Rule 8, just as they have routinely determined whether a joinder of offenses or defendants that Rule 8 authorizes has in a particular case given rise to such prejudice that a severance is mandated under Fed. R. Crim. P. 14. Application of the harmless error rule to questions of joinder will further the purposes of both Rule 8 and Rule 52(a) without sacrificing any interest of defendants in a fair trial.

There is no reason for excepting misjoinder from the operation of the harmless error requirement. The Court has applied the harmless error rule even to most constitutional errors, exempting only a narrow class of cases, such as deprivation of the assistance of counsel or trial before a biased tribunal, in which the error by its nature inescapably taints the entire proceeding. It would be incongruous indeed to conclude that misjoinder (which is not a constitutional error) is somehow exempt from this fundamental principle of appellate review. The fact that a trial court has no discretion to refuse a severance of misjoined charges or defendants is immaterial to the present inquiry; that may establish the existence of error without regard to consideration of prejudice, but of course the presence of error is an inevitable ingredient of the harmless error doctrine, not a factor rendering the doctrine inapplicable. Recognition of the duty to apply the harmless error doctrine here will not render Rule 8 redundant with Rule 14, nor is it foreclosed by the Court's decision in *McElroy* v. *United States*, 164 U.S. 76 (1896), rendered before the first statute prohibiting reversal of judgments for nonprejudicial errors.

While the Court may wish to remand this case to the court of appeals for consideration of the harmfulness of the error here, we think it plain that the joinder of count 1 with counts 2 through 6 did not materially prejudice defendants in light of the overwhelming evidence of their guilt, the district court's limiting instructions, and the admissibility of the same evidence on separate retrials.

II

The evidence is clearly sufficient to support defendants' convictions for mail fraud in connection with the duplex arson. The charged mailings did not take place after defendants had fully secured the proceeds of their fraudulent scheme. Even if they had, the mailings were "for the purpose of executing" that scheme within the meaning of 18 U.S.C. 1341 because they helped to lull the insurance company into believing that defendants' claim was a valid one and thereby served to make detection of the scheme less likely. See *United States* v. *Sampson*, 371 U.S. 75 (1962). This Court's decision in *United States* v. *Maze*, 414 U.S. 395 (1974), is not to the contrary, because the mailings there increased rather than decreased the likelihood that the defendant's scheme would be discovered, and so could not have been in furtherance of that scheme. The policy behind Section 1341, to prohibit all fraudulent uses of the federal mails and thereby to protect the public, clearly would be contravened by creating the exception from its provisions that defendants here seek to establish.

ARGUMENT

I. A CONVICTION MAY NOT BE REVERSED ON THE BASIS OF MISJOINDER UNDER RULE 8 OF THE FEDERAL RULES OF CRIMINAL PROCEDURE IF THE ERROR WAS HARMLESS

The court of appeals erred in refusing to consider whether the misjoinder of count 1 under Fed. R. Crim. P. 8(b)[8] constituted harmless error. Although

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[8] Although we believe, as we argued to the court of appeals, that the joinder here was permissible under Rule 8(b), we have not presented that largely factual question to this

the circuits are divided on the question, the better reasoned and more recent line of cases supports application of the harmless error standard of Fed. R. Crim. P. 52(a) to misjoinder under Rule 8.[9] There

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Court. Rather than treating the question solely under Rule 8(b) (see Pet. App. 9a), the court of appeals arguably should have determined under Rule 8(b) that the defendants were properly joined because they "participated in the same act or transaction or in the same series of acts or transactions," and then determined under Rule 8(a) that the offenses charged against each defendant were properly joined. Count 1 would plainly have been properly joined on this analysis because the El Toro restaurant fraud was, under Rule 8(a), "of the same or similar character" as the duplex fraud and flower shop scheme. While it is "quite possible" that the Rule's drafters intended such an approach, the courts of appeals have consistently analyzed all joinder questions involving multiple defendants under Rule 8(b) alone. 1 C. Wright, *Federal Practice and Procedure: Criminal* § 144, at 494 & n.1 (1982) (citing cases); see also 8 J. Moore, *Moore's Federal Practice* ¶ 8.05[1], at 8-19 (2d ed. 1984). In considering whether the harmless error rule applies to misjoinder, it should make no difference whether the joinder question arises under Rule 8(a) or Rule 8(b). See, *e.g.*, *United States* v. *Ajlouny*, 629 F.2d 830, 843 (2d Cir. 1980) (treating issue as one under Rule 8 and citing precedents addressing both sections of the Rule), cert. denied, 449 U.S. 1111 (1981).

[9] For the view that misjoinder may constitute harmless error, see, *e.g.*, *United States* v. *Ajlouny*, 629 F.2d 830, 843 (2d Cir. 1980), cert. denied, 449 U.S. 1111 (1981); *United States* v. *Werner*, 620 F.2d 922, 926 (2d Cir. 1980); *United States* v. *Turbide*, 558 F.2d 1053, 1061 (2d Cir.), cert. denied, 434 U.S. 934 (1977); *United States* v. *Granello*, 365 F.2d 990, 995 (2d Cir. 1966), cert. denied, 386 U.S. 1019 (1967); *United States* v. *Seidel*, 620 F.2d 1006 (4th Cir. 1980); *United States* v. *Bibby*, 752 F.2d 1116, 1121-1122 (6th Cir. 1985); *United States* v. *Hatcher*, 680 F.2d 438, 442 (6th Cir. 1982); *United States* v. *Varelli*, 407 F.2d 735, 747-748 (7th Cir. 1969); *United States* v. *Martin*, 567 F.2d 849, 854

is nothing peculiar to questions of joinder that warrants excepting them from the general rule, embodied in statutory directives, that courts of appeals have a duty to disregard all trial errors that did not affect a defendant's substantial rights. Indeed, application of the harmless error rule to misjoinder will further the salutary purposes both of Rule 8 and of Rule 52(a). This is shown especially clearly in this case, as it is beyond question that the defendants were not materially prejudiced by the trial of count 1 together with counts 2 through 6.

A. Federal Appellate Courts Have A Duty To Disregard All Harmless Errors, Including Misjoinder

Rule 52(a) of the Federal Rules of Criminal Procedure directs that "[*a*]*ny* error * * * which does not affect substantial rights *shall* be disregarded"

(9th Cir. 1977); *Baker* v. *United States*, 401 F.2d 958, 972-974 (D.C. Cir. 1968). Except for the Second Circuit, each of these courts of appeals reversed a previously taken position that misjoinder is prejudicial per se. See, *e.g.*, *Ingram* v. *United States*, 272 F.2d 567 (4th Cir. 1959); *United States* v. *Sutton*, 605 F.2d 260, 272 (1979), on reh'g, 642 F.2d 1001 (6th Cir. 1980), cert. denied, 453 U.S. 912 (1981); *United States* v. *Gougis*, 374 F.2d 758, 762 (7th Cir. 1967); *Metheany* v. *United States*, 365 F.2d 90, 94-95 (1966), later appeal, 390 F.2d 559 (9th Cir.), cert. denied, 393 U.S. 824 (1968); *Ward* v. *United States*, 289 F.2d 877, 878 (D.C. Cir. 1961). For cases still adhering to that position, see, *e.g.*, *United States* v. *Turkette*, 632 F.2d 896, 906 & n.35 (1st Cir. 1980), rev'd on other grounds, 452 U.S. 576 (1981); *United States* v. *Bova*, 493 F.2d 33 (5th Cir. 1974); *United States* v. *Bledsoe*, 674 F.2d 647, 654, 657-658 (8th Cir.), cert. denied, 459 U.S. 1040 (1982); *United States* v. *Eagleston*, 417 F.2d 11, 14 (10th Cir. 1969); *United States* v. *Ellis*, 709 F.2d 688, 690 (11th Cir. 1983); see also *United States* v. *Graci*, 504 F.2d 411, 414 (3d Cir. 1974).

(emphasis added). To similar effect, 28 U.S.C. 2111 enjoins federal appellate courts to "give judgment * * * without regard to errors or defects which do not affect the substantial rights of the parties." [10] In *United States* v. *Hasting*, 461 U.S. 499, 509 (1983), this Court made it clear that "it is the duty of a reviewing court to consider the trial record as a whole and to ignore errors that are harmless." See also, *e.g.*, *Brown* v. *United States*, 411 U.S. 223, 230-232 (1973); *Milton* v. *Wainwright*, 407 U.S. 371 (1972); *Harrington* v. *California*, 395 U.S. 250 (1969); *Chapman* v. *California*, 386 U.S. 18 (1967); *Kotteakos* v. *United States*, 328 U.S. 750 (1946).

The harmless error rule as expressed in Fed. R. Crim P. 52(a), 28 U.S.C. 2111, and this Court's decisions admits of no exception for claims of improper joinder. To carve out such an exception, requiring a new trial even though the asserted misjoinder was harmless error, would be inconsistent with the beneficial purposes of both Rule 52(a) and Rule 8. As the Court noted in *Hasting*, the purpose of the harmless error rule is " 'to conserve judicial resources by enabling appellate courts to cleanse the judicial process of prejudicial error without becoming mired in harmless error.' " 461 U.S. at 509, quoting R. Tray-

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[10] Congress intended that 28 U.S.C. 2111 would assure that the harmless error rule apply in appellate as well as trial courts. H.R. Rep. 352, 81st Cong., 1st Sess. 18 (1949). Both Rule 52(a) and Section 2111 are based on former 28 U.S.C. (1946 ed.) 391, which provided that judgment be given "without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties." Significantly, both Rule 52(a) and Section 2111 omit the limitation that only "technical" errors be subject to the harmless error standard. See generally *Hasting*, 461 U.S. at 509-510 n.7.

nor, *The Riddle of Harmless Error* 81 (1970); see *Kotteakos*, 328 U.S. at 758-760. In the context of a criminal prosecution, the harmless error rule recognizes that "justice, though due to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true." *Snyder* v. *Massachusetts*, 291 U.S. 97, 122 (1934) (Cardozo, J.); see also *Bruton* v. *United States*, 391 U.S. 123, 135 (1968) (" 'A defendant is entitled to a fair trial but not a perfect one,' " quoting *Lutwak* v. *United States*, 344 U.S. 604, 619 (1953)). The interests of society, victims, and witnesses are served by according finality to convictions reached after trials that, though imperfect, were not infected by materially prejudicial error. See *Hasting*, 461 U.S. at 507.

The purposes of the joinder rules, to "conserve state funds, diminish inconvenience to witnesses and public authorities, and avoid delays in bringing those accused of crime to trial" (*Bruton*, 391 U.S. at 134), are fully consistent with the goals of the harmless error doctrine—both are designed to promote efficiency without sacrificing the rights of defendants. See *Parker* v. *United States*, 404 F.2d 1193, 1196 (9th Cir. 1968) (footnote omitted), cert. denied, 394 U.S. 1004 (1969) (joinder "expedites the administration of justice, reduces the congestion of trial dockets, conserves judicial time, lessens the burden upon citizens who must sacrifice both time and money to serve upon juries, and avoids the necessity of recalling witnesses who would otherwise be called upon to testify only once"); *United States* v. *Werner*, 620 F.2d 922, 928 (2d Cir. 1980) ("trial convenience and economy of judicial and prosecutorial resources [are] considerations of particular weight when the Govern-

ment and the courts have been placed under strict mandate to expedite criminal trials [under the] Speedy Trial Act").

To remove such a significant category of cases as those involving allegations of misjoinder[11] from operation of the harmless error rule would thus be at odds with the intent behind both Rule 52(a) and Rule 8. Indeed, the Court's discussion of the harmless error standard in *Kotteakos* v. *United States*, *supra*, which raised joinder as well as variance issues (328 U.S. at 756 n.6, 774-775), demonstrates the applicability of the harmless error doctrine to violations of Rule 8. The Court in *Kotteakos* clearly assumed that the harmless error requirement is applicable to questions of joinder, for it stated (328 U.S. at 775) that the harmless error statute "carries the threat of overriding the requirement of [the joinder statute] * * *, unless the application of [the harmless error statute] is made with restraint." The Court concluded (*ibid.*) that the harmless error and joinder rules "must be construed and applied so as to bring them into substantial harmony, not into square conflict." That harmony is not achieved by nullifying the harmless error principle, but by scrutinizing cases of misjoinder carefully; but if errors in joinder, like almost any other errors, have not affected the substantial rights of the defendants, re-

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[11] Professor Moore has observed (8 J. Moore, *supra*, ¶ 8.02[1], at 8-2 to 8-3 (footnote omitted)):

> The criteria for joinder of offenses and defendants are spelled out in three deceptively simple sentences of Rule 8. None of the Federal Rules has given rise to so much misunderstanding, yet few of the Rules are so vital.

Certainly the Court should be chary of mandating automatic reversal in an area where error is so common.

versal is improper. In *Schaffer* v. *United States*, 362 U.S. 511, 517 (1960), as in *Kotteakos*, the Court appeared to recognize that the harmless error rule is applicable to improper joinder, though the Court found that the rule "is not even reached * * * since here the joinder was proper under Rule 8(b) and no error was shown." See *United States* v. *Granello*, 365 F.2d 990, 995 (2d Cir. 1966) ("[i]n the *Schaffer* case the Court implied that the harmless error rule is applicable to questions of improper joinder"), cert. denied, 386 U.S. 1019 (1967).

B. There Is No Basis On Which To Except Misjoinder From The Harmless Error Doctrine

1. In *Hasting*, the Court noted that "certain errors may involve 'rights so basic to a fair trial that their infraction can never be treated as harmless error' " (461 U.S. at 508 n.6, quoting *Chapman* v. *California*, 386 U.S. at 23). Such fundamental rights include the right to counsel [12] and the right to an impartial judge.[13] But the joinder standards of Rule 8, which are not even of constitutional magnitude,[14] obviously do not rise to the level of these fun-

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[12] *Gideon* v. *Wainwright*, 372 U.S. 335 (1963).

[13] *Tumey* v. *Ohio*, 273 U.S. 510 (1927).

[14] "[N]o federal court has raised misjoinder to an error of constitutional dimension." Note, *Harmless Error and Misjoinder Under the Federal Rules of Criminal Procedure: A Narrowing Division of Opinion*, 6 Hofstra L. Rev. 533, 540 (1978) (footnote omitted). See, *e.g.*, *United States* v. *Seidel*, 620 F.2d at 1013 (misjoinder only "a violation of a mere procedural rule") (footnote omitted); see generally *Schaffer* v. *United States*, 362 U.S. 511 (1960). The Court's discussion of the harmless error standard for nonconstitutional viola-

damental rights. Moreover, while improper joinder may give rise to constitutional violations, such as *Bruton* problems, those violations themselves, like other constitutional errors, are subject to the harmless error rule. See *Brown* v. *United States*, 411 U.S. at 231; *Harrington* v. *California*, 395 U.S. at 252-254; see also *Moore* v. *Illinois*, 434 U.S. 220, 232 (1977) (introduction of evidence from unconstitutional identification may be harmless); *Milton* v. *Wainwright*, 407 U.S. at 372 (introduction of improperly obtained confession may be harmless); *Chambers* v. *Maroney*, 399 U.S. 42, 52-53 (1970) (introduction of evidence seized in violation of the Fourth Amendment may be harmless); *Coleman* v. *Alabama*, 399 U.S. 1, 10-11 (1970) (denial of counsel at preliminary hearing may be harmless); *United States* v. *Wade*, 388 U.S. 218, 242 (1967) (tainted in-court identification may be harmless).

Nor is the prejudice that may result from misjoinder so difficult to ascertain that it must be presumed always to be present.[15] Trial courts routinely

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tions in *Kotteakos* v. *United States*, *supra*, further suggests that improper joinder does not, in itself, violate the Constitution. Finally, there is of course no constitutional provision directly addressing joinder. If misjoinder is ever unconstitutional in a particular case, therefore, it could only be because the ensuing prejudice is so great as to deny a defendant a fair trial in contravention of the Fifth Amendment. But where no prejudice has arisen, no constitutional violation could possibly have occurred.

[15] Contrary to defendants' argument (84-744 Br. in Opp. 8), Rules 8 does not represent a determination that a defendant will be prejudiced in every case where its requirements have been contravened in the slightest degree. At most, the Rule is based on a prediction of when, in general, the danger of prejudice will outweigh the gains joinder achieves in trial

inquire into the possible prejudice flowing from joint trials in determining whether to grant a severance under Fed. R. Crim. P. 14,[16] and appellate courts just as routinely perform that inquiry in reviewing Rule 14 rulings. Where the dangers that Rule 8 is designed to guard against have materialized in the form of actual prejudice to a defendant's substantial rights, misjoinder will result in reversal.[17]

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efficiency and convenience. See 8 J. Moore, *supra*, ¶ 8.02. Rule 8 does not speak to the presence of material prejudice in specific cases. Rather, just as Rule 14 allows for severance in a particular case on the grounds of prejudice where Rule 8 permits joinder, Rule 52(a) mandates affirmance in the absence of prejudice where a joint trial has taken place in violation of Rule 8.

[16] Fed. R. Crim. P. 14 provides:

> If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires. In ruling on a motion by a defendant for severance the court may order the attorney for the government to deliver to the court for inspection *in camera* any statements or confessions made by the defendants which the government intends to introduce in evidence at the trial.

[17] The joinder rule is intended in part to avoid "mass trials." See *Ingram* v. *United States*, 272 F.2d at 570-571. But where a defendant has received a fair trial, where he has not been prejudiced by misjoinder, there is no call for reversal. Certainly the avoidance of "mass trials" is not furthered in any sensible way by a rule of automatic reversal for violations of Rule 8. One might just as well urge that the purposes of the hearsay rules or of the Fifth Amendment mandate that all violations of thier standards result in reversal. This Court

But where a court is confident that no prejudice has arisen—where, for example, the evidence of guilt is overwhelming or the evidence admitted at the joint trial would also be admissible at separate trials—the harmless error rule is appropriately invoked. Those circuits that have applied Rule 52(a) to misjoinder have engaged in the same sort of careful inquiry into the possibility of prejudice that has characterized the proper application of the harmless error rule in other contexts. See, *e.g.*, *United States* v. *Bibby*, 752 F.2d 1116, 1122 (6th Cir. 1985); *United States* v. *Seidel*, 620 F.2d 1006, 1009-1011 (4th Cir. 1980); *United States* v. *Turbide*, 558 F.2d 1053, 1061-1063 (2d Cir.), cert. denied, 434 U.S. 934 (1977); see also 8 J. Moore, *Moore's Federal Practice* ¶ 8.04[2], at 8-18 to 8-19 (2d ed. 1984) (application of Rule 52(a) to misjoinder "is acceptable and even desirable * * *[;] [d]efendants will suffer * * * only if, in the name of 'efficiency,' the [harmless error] doctrine is not carefully and strictly construed").

2. In support of the view that the harmless error standard is inapplicable to misjoinder, defendants argue (84-744 Br. in Opp. 6-7) that application of Rule 52(a) in these circumstances would effectively make Rule 8 redundant with Rule 14, which expressly addresses the issue of prejudicial joinder (see note

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has of course consistently rejected such an approach, most recently in *Hasting* (461 U.S. at 507):

> The court [of appeals] appears to have decided to deter future similar [prosecutorial] comments by the drastic step of reversal of these convictions. But the interests preserved by the doctrine of harmless error cannot be so lightly and casually ignored in order to chastise what the court viewed as prosecutorial overreaching.

16, *supra*). But this fallacious objection misses the crucial fact that the rules are addressed to procedures in the district court, where they are quite clearly distinct in operation: Rule 8 *requires* the court to grant a motion for severance unless its standards are met, without regard to the question of prejudice, while Rule 14 gives the court *discretion* to grant such a motion in the case of joinder that, though proper under Rule 8, is prejudicial. This difference goes to the question whether there has been error at all—an indispensable prerequisite to *any* application of the harmless error rule—not to the quite distinct question whether the error requires setting aside the convictions. Consequently, it is wholly fallacious to contend that the difference in the rules is eviscerated simply because, on appeal, a reviewing court will not set aside a conviction for a violation of Rule 8 in the absence of prejudice.

Moreover, even when Rule 52(a) is applied to violations of Rule 8, an important distinction remains between appellate review of the denial of Rule 8 motions and of those brought under Rule 14: the former are reviewed as a matter of law, with affirmance proper only if the government has carried the burden of establishing the harmlessness of any error, while the latter are reviewed under the highly deferential abuse-of-discretion standard, with the defendant having to shoulder the burden of a clear demonstration of substantial prejudice. For these reasons, Rule 14 cannot be said to create an implicit exception to the application of the harmless error standard with respect to misjoinder. As Judge Friendly stated in *United States* v. *Granello* (365 F.2d at 995), "[w]e see no reason why the undoubted truth that an appeal claiming misjoinder under Rule 8(b) raises a question of law in the strict sense, whereas an ap-

peal from denial of severance under Rule 14 normally raises only one of abuse of discretion, should carry exemption from the harmless error rule * * * as a corollary." See also *United States* v. *Seidel*, 620 F.2d at 1014-1015; *United States* v. *Werner*, 620 F.2d at 926; *Baker* v. *United States*, 401 F.2d 958, 973 (D.C. Cir. 1968).

3. Finally, this Court's decision in *McElroy* v. *United States*, 164 U.S. 76 (1896), while often cited for the proposition that misjoinder is prejudicial per se,[18] in fact does not establish such a rule. In that case, which was decided prior to either the adoption of the Federal Rules of Criminal Procedure in 1946 or the enactment of the harmless error statute in 1919 (see Act of Feb. 26, 1919, ch. 48, 40 Stat. 1181, 28 U.S.C. (1946 ed.) 391)), the government argued that the finding of misjoinder did not require reversal of the convictions of those defendants who had been charged in all counts "because there is nothing in the record to show that they were prejudiced or embarrassed in their defence by the course pursued" (164 U.S. at 81). The Court rejected this argument on the ground that "[i]t cannot be said * * * that all the defendants may not have been embarrassed and prejudiced in their defence, or that the attention of the jury may not have been distracted to their injury in passing upon distinct and independent transactions" (*ibid.*). Thus, *McElroy* rests upon the conclusion that the misjoinder there might have been prejudicial and so could not be presumed harmless. See *United States* v. *Granello*, 365 F.2d at 995. To whatever extent it might be thought that *McElroy*

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[18] See, *e.g.*, *United States* v. *Turkette*, 632 F.2d at 906 n.35; *United States* v. *Graci*, 504 F.2d at 413.

does establish a rule of per se reversal that survives subsequent legislation barring reversal for harmless errors, the decision should be reexamined in light of the Court's more recent precedents on both the harmless error and the joinder rules (see pages 16-20, *supra*).

C. The Misjoinder Of Count 1 Did Not Prejudice The Rights Of The Defendants

While this Court, if it agrees with us that misjoinder is subject to harmless error evaluation, may prefer to remand to the court of appeals for consideration of the harmfulness of the misjoinder of count 1, we believe there can be no question that it did not materially prejudice defendants' rights in the circumstances of this case.[19] See *Hasting*, 461 U.S. at 510 (this Court has authority to evaluate harmless error claims even where court of appeals has not done so). To begin with, any error in joining count 1 to the others was at most marginal. Although there may not have been a single overarching conspiracy encompassing all three fraudulent arson schemes (see Pet. App. 12a), their close relation in terms of time, method, and participants suggests that it was only the court of appeals' narrow reading of Rule 8 that resulted in its conclusion of misjoinder here.[20]

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[19] Because violation of Rule 8 is not an error of constitutional dimension (see note 14, *supra*), the harmfulness of the error in this case is to be assessed under the normal standard of *Kotteakos* (see 328 U.S. at 764-765) rather than under the strict reasonable-doubt standard established by *Chapman* for constitutional violations.

[20] Although it has been suggested that those circuits that refuse to apply the harmless error rule to misjoinder have, in unacknowledged compensation, broadened the scope of per-

Moreover, the testimonial and documentary evidence against defendants, consisting of 29 witnesses, including the Lanes' "torches" (Heard and Lankford) and more than 100 exhibits, was overwhelming and countered by little more than Dennis Lane's denials and J.C. Lane's character defense. There is simply no reasonable probability in light of this evidence that the joinder of count 1 materially contributed to their convictions. See, *e.g.*, *Hastings*, 461 U.S. at 512 (error was harmless in light of the "overwhelming evidence of guilt and the inconsistency of the scanty evidence tendered by the defendants"); *United States* v. *Ong*, 541 F.2d 331, 338 (2d Cir. 1976) ("where untainted evidence of guilt is substantial, a greater demonstration of prejudice from an erroneous failure to sever must be made before the error will be considered to require reversal"). This conclusion is buttressed by the district court's instructions that the evidence in count 1—which was distinct and easily segregated from the evidence relating to the other five counts (see generally *United States* v. *Bibby*, 752 F.2d at 1122)—not be considered against Dennis Lane and that the jury give separate consideration to each defendant and each count (J.A. 21). See, *e.g.*, *United States* v. *Seidel*, 620 F.2d at 1010; *United States* v. *Granello*, 365 F.2d at 995.

Finally, if any doubt remains as to the harmlessness of the joinder of count 1, it is dispelled by consideration of the evidence that would be admissible at separate trials on remand: the new trials of defendants would, in fact, be so substantially similar to

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missible joinder (see Note, *supra*, 6 Hofstra L. Rev. at 563), the court of appeals in this case combined a crabbed reading of Rule 8 with automatic reversal.

the trial that they have already had that any conclusion of prejudice can only be deemed wholly implausible. At a joint trial of counts 2 through 6, evidence of the El Toro restaurant arson and fraud would still be admissible to establish J.C. Lane's intent or for similar purposes under Fed. R. Evid. 404(b). See, *e.g.*, *United States* v. *Ajlouny*, 629 F.2d 830, 843 (2d Cir. 1980), cert. denied, 449 U.S. 1111 (1981); *United States* v. *Martin*, 567 F.2d 849, 854 (9th Cir. 1977). Defendants would receive limiting instructions just as they did at the trial that has already taken place. Any possibility of transference of guilt is remote in light of the substantial involvement of both defendants and would not be reduced on their joint retrial. See, *e.g.*, *United States* v. *Turbide*, 558 F.2d at 1061; *Baker* v. *United States*, 401 F.2d at 972.[21]

In short, defendants were convicted on overwhelming evidence following a lengthy trial. The court of appeals reversed for a technical violation of the joinder requirements without any determination of the harmfulness of the error. At a time when the criminal justice system is already overburdened,[22] such a

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[21] In any event, reversal of J.C. Lane's convictions on counts 2 through 5 is wholly unsupportable, as those counts could have been tried with count 1 (at a trial of J.C. Lane alone) or with count 6 (at a trial with Dennis Lane). Surely, no cognizable prejudice arose simply because counts 2 through 5 were tried with both of the other counts.

[22] Incredibly, defendants argue (84-744 Br. in Opp. 9-10) that application of the harmless error rule will add to the burdens facing the courts. The effort expended by the courts of appeals in assessing the harmfulness of trial errors pales next to the time and resources that must be dedicated to retrials if reversals need not be predicated on actual prejudice to defendants.

result, which does nothing to contribute to the fairness of the process, makes little sense indeed.

II. THE EVIDENCE WAS SUFFICIENT TO SUPPORT DEFENDANTS' CONVICTIONS FOR MAIL FRAUD ON COUNTS 2 THROUGH 4

The court of appeals correctly rejected (Pet. App. 15a-18a) defendants' contention that the evidence was insufficient to show that the mailings charged in counts 2 through 4 of the indictment (J.A. 14-17) were "for the purpose of executing" (18 U.S.C. 1341) their fraudulent scheme. The charged use of the mails need not be "an element" of the scheme. Rather, it is enough that the mailing be "incident to an essential part of the scheme." *Pereira* v. *United States*, 347 U.S. 1, 8 (1954). The evidence at trial, viewed in the light most favorable to the government, see, *e.g.*, *Glasser* v. *United States*, 315 U.S. 60, 80 (1942), plainly satisfies this test.

Defendants do not now contend that they did not engage in a scheme to defraud their insurance company by deliberately burning their duplex in order to receive the proceeds of the fire insurance policy. Nor do they deny that the proofs of loss and invoices they caused to be mailed to the company were fraudulent.[23] Rather, they argue only (84-963 Cross-Pet. 4-10) that the mailings could not have been for the purpose of executing their scheme because each mailing took place after they had received the payment from the

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[23] A defendant "causes" a mailing under 13 U.S.C. 1341 where the use of the mails "can reasonably be foreseen, even though not actually intended [by him]." *Pereira*, 347 U.S. at 9. Under 18 U.S.C. 2(b), it is of course not necessary that the defendant himself have actually used the mails (347 U.S. at 8).

company relating to the documents mailed. This argument is erroneous both on the facts and on the law.

1. Defendants had not received the proceeds of their fraud when the charged mailings took place. The proof-of-loss forms charged in counts 2 and 3 were mailed well before the final and largest payment on the policy was made in September 1980. These mailings were substantially connected to the last payment, as the proofs of loss (which averred that the loss had not been caused by the insured) related to the entire claim, which was not settled until the September 18, 1980 payment. Indeed, the first payment was only an advance for repairs that purportedly continued until the final settlement (see pages 6-7, *supra*). Moreover, the indictment charged that these mailings were in furtherance of the entire fraudulent scheme relating to the duplex arson, and not merely in furtherance of obtaining the particular payments directly related to the proof-of-loss forms (J.A. 14-16). The scheme obviously was still continuing when the mailings charged in counts 2 and 3 took place. The convictions on these counts are therefore amply supported by the evidence.

Although the September 1980 mailing charged in count 4 took place two days after defendants had received the final draft in payment from the insurance company, they had not yet fully secured the proceeds of that payment at the time of the mailing. Raymond Thompson, the property manager for the insurance company's claims department (Tr. 208), testified that the drafts issued by the company, unlike checks, are not payable on demand but only upon authorization from the home office when they arrive at the company's bank for collection (Tr. 212-213). If "there was something wrong with the claim" (Tr. 218), pay-

ment could have been stopped by the company even after the draft had been issued. The cashier at defendants' bank (Tr. 364) testified that if the drafts deposited by defendants had been dishonored by the insurance company's banks, the amounts would have been charged against defendants' account (Tr. 395). Had defendants already withdrawn all or part of the funds, their account would have been put in overdraft status, allowing the bank to recover the funds from defendants (Tr. 396). Accordingly, defendants had not irrevocably received the proceeds of the final payment at the time of the mailing charged in count 4. Had the mailing not taken place, the insurance company could have refused to honor the draft and defendants could not have retained the funds in question. See *United States* v. *MacClain*, 501 F.2d 1006, 1012 (10th Cir. 1974) (mailing was in furtherance of fraudulent scheme where victim could have stopped payment on previously tendered check had mailing not occurred).

2. Even assuming that defendants had obtained the funds in question before each charged mailing, the jury was still entitled to find that the mailings were in furtherance of the fraudulent scheme. There is no per se rule that mailings occurring after payment has been received cannot be "for the purpose of executing" a scheme to defraud under Section 1341. To the contrary, this Court has held that letters designed to lull victims into a false sense of security, postpone their complaints, and delay discovery of the defendants' scheme are within the statute. *United States* v. *Sampson*, 371 U.S. 75 (1962) (subsequent mailings assured victims that the services they had paid for would be performed); see *United States* v. *Maze*, 414 U.S. 395, 403 (1974). The courts of ap-

peals have also consistently upheld convictions under Section 1341 on the theory that subsequent mailings furthered the defendants' schemes because the mailings lulled victims into believing that they had not been defrauded. See, *e.g.*, *United States* v. *Elkin*, 731 F.2d 1005, 1008-1009 (2d Cir. 1984), cert. denied, No. 83-1848 (Oct. 1, 1984); *United States* v. *Jones*, 712 F.2d 1316, 1320 (9th Cir.), cert. denied, 464 U.S. 985 (1983); *United States* v. *Chappell*, 698 F.2d 308, 311 (7th Cir.), cert. denied, 461 U.S. 931 (1983); *United States* v. *Wrehe*, 628 F.2d 1079, 1082-1083 (8th Cir. 1980); *United States* v. *Toney*, 605 F.2d 200, 206-207 (5th Cir. 1979), cert. denied, 444 U.S. 1090 (1980); *United States* v. *Vanderpool*, 528 F.2d 1205, 1207 (4th Cir. 1975), cert. denied, 424 U.S. 922 (1976); *United States* v. *MacClain*, *supra*; *Bliss* v. *United States*, 354 F.2d 456, 457 (8th Cir. 1966) (Blackmun, J.).[24]

The jury was properly instructed in accordance with this theory that mailings "which facilitate concealment of the scheme are mailings in furtherance of the scheme" (J.A. 24), although mailings that occur after "the alleged scheme in its entirety had been completed" do not violate the statute (J.A. 23). See page 11 note 7, *supra*. Under these instructions, the jury could surely have concluded that the scheme had not ended with the September 16, 1980 payment, but continued at least through the September 18 mailing to the insurance company of the fraudulent in-

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[24] Cf. *United States* v. *Miller*, 664 F.2d 94, 98 (5th Cir. 1981), cert. denied, 459 U.S. 854 (1982) (co-conspirator's statement made to allay third party's suspicions was in furtherance of conspiracy and therefore admissible under Fed. R. Evid. 801(d)(2)(E)); *United States* v. *Gleason*, 616 F.2d 2, 23 (2d Cir. 1979), cert. denied, 444 U.S. 1082 (1980) (same).

voices that formed the basis for that payment.[25] Defendants can reasonably be charged with having foreseen the subsequent mailing to the insurance company, which followed the company's normal business practice. And the mailing plainly contributed to the success of defendants' scheme; had it not taken place, the company might well have immediately investigated the circumstances of the claimed loss and discovered defendants' fraud. Indeed, following the mailing the company conducted an on-site inspection of the duplex in order to verify defendants' claims and took action in November 1980 to obtain reimbursement when it appeared that some items of the claim were not supported (Tr. 220-221).

The courts of appeals have upheld mail-fraud convictions in similar circumstances. In *United States* v. *Angelilli*, 660 F.2d 23 (2d Cir. 1981), cert. denied, 455 U.S. 910 (1982), the defendants fraudulently appropriated part of the proceeds from the sales of debtors' property and then mailed letters to creditors with the remaining proceeds, falsely stating that the creditors were receiving all of the funds obtained in the sales. The court of appeals reasoned (*id.* at 36-37) that the defendants' subsequent communications with their victims were a necessary part of the scheme that served to lull the creditors into think-

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[25] The indictment properly charged that the mailings were "for the purpose of executing" defendants' fraudulent scheme (J.A. 15, 16, 17). There was no need for the indictment to state specifically that the letters were intended to "lull" the insurance company. *Hermansen* v. *United States*, 228 F.2d 495, 499, reh'g denied, 230 F.2d 173 (5th Cir.), cert. denied, 351 U.S. 924 (1956); see also *United States* v. *Buchanan*, 633 F.2d 423, 426 (5th Cir. 1980), cert. denied, 451 U.S. 912 (1981); see generally *United States* v. *Miller*, No. 83-1750 (Apr. 1, 1985), slip op. 6-8.

ing that they had not been defrauded. Here as well, the mailing to the insurance company headquarters was a necessary part of the scheme, without which the company would have taken steps to recover its payments and to investigate the claim (Tr. 215-221). Similarly, in *United States* v. *Shelton*, 669 F.2d 446 (7th Cir.), cert. denied, 456 U.S. 934 (1982), the court of appeals held (669 F.2d at 458) that stock certificates mailed to investors after they had parted with their money were within Section 1341. The stock certificates in *Shelton*, like the proof-of-loss forms and invoices here, represented to the victims the object for which they had expended their funds. Had they not received this evidence of their expenditures, the victims would more likely have initiated action leading to discovery that they had been defrauded. Finally, in *United States* v. *Moss*, 591 F.2d 428 (8th Cir. 1979), the defendant was charged with defrauding an insurance company. Even though the defendant had already obtained an insurance policy, the mailing to him of a policy amendment was held to come within Section 1341. The court of appeals reasoned (591 F.2d at 437) that the company would not have processed claims without the policy amendment, and that its mailing was therefore in furtherance of the scheme to defraud. Here as well, defendants' fraud could not successfully have been perpetrated without mailing of their proof-of-loss forms and invoices to the insurance company. See also cases cited at page 32, *supra*.

United States v. *Maze*, *supra*, is not to the contrary. There, the defendant had fraudulently used a stolen credit card. He was charged with violating Section 1341 on the basis of invoices mailed to the card's issuing bank for payment. The Court rea-

soned (414 U.S. at 403) that the mailings could not have lulled the defendant's victims, but rather "increased the probability that [he] would be detected and apprehended." The defendant "probably would have preferred to have the invoices misplaced * * * and never mailed at all" (*id.* at 402). Here, by contrast, the proof-of-loss forms and invoices served to hide defendants' fraud by making it appear that a legitimate fire and loss had taken place. Had the mailings not occurred, the insurance company would have investigated the matter, increasing the chance of defendants' discovery. This is precisely the opposite of what took place in *Maze*, where the bank would not have been aware of the fraudulent purchases if the invoices had never been mailed to it. Rather, this case is controlled by *United States* v. *Sampson*, *supra*. The subsequent mailings there, like the ones here, "were designed to lull the victims into a false sense of security, postpone their ultimate complaint to the authorities, and therefore make the apprehension of the defendants less likely than if no mailings had taken place" (*Maze*, 414 U.S. at 403).[26]

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[26] In *United States* v. *Ledesma*, 632 F.2d 670 (7th Cir.), cert. denied, 449 U.S. 998 (1980), the court of appeals erroneously relied on *Maze* in holding (632 F.2d at 677-678) that the mailing of a proof-of-loss form after receipt of the insurance company's check did not violate Section 1341. The court of appeals failed to discuss *Sampson* and only adverted (without discussion) to the possibility that subsequent mailings may conceal a fraud (632 F.2d at 677-678 n.11). Nor did the court mention the possibility that payment on the check could have been stopped or the funds recovered by the insurance company. To our knowledge, neither the Seventh Circuit nor any other court of appeals has ever relied on *Ledesma* to reverse a conviction under Section 1341. To the contrary, the

No sound policy supports defendants' proposed limitation on the mail fraud statute. Certainly mailings that further a fraudulent scheme but occur after funds have been obtained are no less a danger to the public or a misuse of the Post Office than are similar mailings that take place before victims have parted with their money. Nor does the "lulling" theory render the statutory language a nullity—both this Court and the courts of appeals have reversed convictions because mailings were not made "for the purpose of executing" a scheme to defraud, while recognizing the validity of the doctrine that subsequent mailings may violate the statute. See, *e.g.*, *United States* v. *Maze*, *supra*; *Gordon* v. *United States*, 358 F.2d 112, 114-115 (5th Cir. 1966). Finally, it is important that Section 1341, "traditionally * * * a first line of defense" against fraudulent activity (*Maze*, 414 U.S. at 405 (Burger, C.J., dissenting)), be preserved at least in the full scope of its historic reach against all uses of the mail that further fraudulent schemes. There is no justification for allowing "the ever-inventive American 'con artist' " (*id.* at 407 (Burger, C.J., dissenting)) such a broad exemption from the statutory prohibition as defendants seek to establish.

Seventh Circuit, like the other courts of appeals, has repeatedly affirmed the viability of the lulling theory at issue here. See, *e.g.*, *United States* v. *Chappell*, 698 F.2d at 311; *United States* v. *Shelton*, 669 F.2d at 458.

CONCLUSION

The judgment of the court of appeals should be reversed insofar as it holds that the misjoinder of count 1 was reversible error and affirmed insofar as it holds that the evidence was sufficient to support respondents' convictions on counts 2 through 4.

Respectfully submitted.

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